Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. —398—

PHILLIP ADDABBO and MORTON D. STEIN, as Executor of the Estate of Maurice Berg, deceased,

Petitioners,

—v.—

CURTISS-WRIGHT CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provision and Statute Involved 2

Statement of the Case 3

Reasons for Granting the Writ 5

I. The Federal Court of Appeals has decided an important state question involving the "accrual" of a cause of action in a way in conflict with applicable Florida and New York law 5

II. The unreasonableness of the Court of Appeals' interpretation of the New York statute of limitations has resulted in an arbitrary and unconstitutional application of that statute 7

Conclusion 8

Appendix

First Opinion of the United States Court of Appeals for the Second Circuit 1a

Order following Petition for Rehearing In Banc 10a

Order following Petition for Rehearing 11a

Second Opinion of United States Court of Appeals for the Second Circuit 12a

Dissent of Circuit Judge Hays 21a

Note Regarding Missing Documents 24a

CITATIONS

PAGE

Cases:

Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963) 19a, 21a, 22a
Baron Tube Co. v. Transport Ins. Co., 365 F.2d 858 (5th Cir. 1966) 5, 23a
Berg v. Curtiss-Wright Corporation, 224 F. Supp. 236 (D.C. S.D.N.Y. 1963) 3a
Bicknell v. Central Hanover Bank & Trust Co., 169 Misc. 7, 6 N.Y.S.2d 704 (1938), aff'd 255 App. Div. 956, 8 N.Y.S.2d 668 (1st Dep't 1938) 6, 23a
Braniff Airways, Inc., et al. v. Curtiss-Wright Corporation, 411 F.2d 451 (2nd Cir. 1969) 1a, 13a
Braniff Airways, Inc., et al. v. Curtiss-Wright Corporation, 424 F.2d 431 (2nd Cir. 1970) 12a

Cellura v. Cellura, 24 A.D.2d 59, 263 N.Y.S.2d 843 (1965) 20a
Creviston v. General Motors Corp., 210 So.2d 755 (Fla. Dist. Ct. App. 1968) 7a, 8a, 14a
Creviston v. General Motors Corp., 225 So.2d 331 (Fla. 1969) 15a, 18a, 22a

First Nat'l Bank v. Marcher, 179 Misc. 258, 38 N.Y.S. 2d 774 (1942) 6, 23a
Flanagan v. Mount Eden General Hospital, 24 N.Y.2d 427, 248 N.E.2d 871 (1969) 8a, 14a, 22a

George v. Douglas Aircraft Co., 332 F.2d 73 (2nd Cir. 1964), cert. den. 379 U.S. 904 (1964) 5

Hotaling v. General Elec. Co., 16 A.D.2d 339, 228 N.Y.S. 2d 376 (3rd Dep't 1962), aff'd 12 N.Y.2d 310, 189 N.E. 2d 698 (1963) 8

PAGE

Huddleston v. Dwyer, 322 U.S. 232 (1914) 16a

Johnson v. Cadillac, 261 F. 878 (2nd Cir. 1919) 16a, 17a

Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526 (1961) 19a

Klaxon v. Stentor Mfg. Co., Inc., 313 U.S. 487 (1941) 14a

Lamb v. Powder River Live Stock Co., 132 Fed. 434 (8th Cir. 1904) 7

Lennig v. New York Life Ins. Co., 130 F.2d 580 (3rd Cir. 1942) 17a

Long v. Pan American World Airways, 16 N.Y.2d 337, 213 N.E.2d 796 (1965) 19a

McPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) 16a

Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207 (1969) 5, 7

Merchants Fire Assurance Corporation of N. Y. v. Retail Credit Co., 23 Cal. Rptr. 544, 206 Cal. App. 2d 55 (Dist. Ct. App. Cal. 1962) 5

National Comics Publishers v. Fawcett, 198 F.2d 927 (2nd Cir. 1952) 16a

Noel v. United Aircraft Corp., 342 F.2d 232 (3rd Cir. 1964) 5a

Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940), cert. den. 310 U.S. 650 (1940) 14a

Sanner v. Trustees of Sheppard and Enoch Pratt Hospital, 278 F. Supp. 138 (D.C. Md. 1968), aff'd 398 F.2d 226 (4th Cir. 1968) 7

Schauble v. Schulz, 137 Fed. 389 (8th Cir. 1905) 7

PAGE

Schwartz v. Heyden Newport Chemical Corp., 12 N.Y. 2d 212, 188 N.E.2d 142; mod. 12 N.Y.2d 1073, 190 N.E. 2d 253; cert. den. 374 U.S. 808 (1963) 7, 7a, 8a, 14a, 18a, 22a

United States v. Certain Land, 420 F.2d 370 (2nd Cir. 1969) 15a

United States v. 63.04 Acres of Land, 257 F.2d 68 (2nd Cir. 1958) 16a

Urie v. Thompson, 337 U.S. 163 (1949) 7

Vandercook v. Owens-Illinois Glass Co., 311 U.S. 538 (1941) 16a

West v. American Teleph. & Teleg. Co., 311 U.S. 223 (1940) 6

Zuck v. Interstate Publishing Corp., 317 F.2d 727 (2nd Cir. 1963) 5, 23a

Constitutional Provision, Statutes and Rules:

Federal Rules of Appellate Procedure

Rule No. 26(b) 15a

Rule No. 40 ..... 15a

Federal Rules of Civil Procedure

Rule 24(c) 9a

Rule 50(a) 3a

Fla. Stat. §95.11(4)(e) (1967) 7a

Fourteenth Amendment (Section 1), U.S. Const. 2-3, 7, 8

PAGE

New York Civil Practice Act, §48(1) 3

New York Civil Practice Law and Rules (McKinney 1963)

§202 ..... 7a, 14a, 18a

§203 ..... 20a

§203(f) 20a, 23a

§213(2) 3a, 7a, 14a, 18a

U.S. Code, Title 28, §1254(1) 2

Miscellaneous:

Weinstein-Korn-Miller (New York Civil Practice), Vol. 1, §203.01; p. 2-39.2 ..... 5, 23a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ——

PHILLIP ADDABBO and MORTON D. STEIN, as Executor of the Estate of Maurice Berg, deceased,

Petitioners,

—v.—

CURTISS-WRIGHT CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Phillip Addabbo and Morton D. Stein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on May 19, 1969 as modified, in part, by the Court of Appeals' order dated April 16, 1970 following petition for rehearing.

Opinions Below

The oral decision of the District Court for the Southern District of New York delivered on June 20, 1968 has not been officially or unofficially reported. The first opinion of the Circuit Court of Appeals for the Second Circuit, printed in the Appendix hereto at pages 1a to 9a, is officially reported at 411 F.2d 451; and that Court's second opinion

(on a petition for rehearing), which appears in the appendix at pages 12a to 21a, is officially reported at 424 F.2d 427. The dissenting opinion of Circuit Judge Paul R. Hays is reported at 424 F.2d 431, and is also printed in the Appendix at pages 21a to 23a.

Jurisdiction

The pertinent judgment of the Circuit Court of Appeals was entered on May 19, 1969 and was modified by the Court of Appeals' order dated April 16, 1970 following petition for rehearing. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Whether a Federal Court sitting in a "diversity of citizenship" case may ignore the applicable substantive Florida law regarding the accrual of breach of implied warranties claims with the result that injured aviation passengers' warranty suits were deemed time-barred.

2. Whether it is constitutional to construe a statute of limitations to the effect that injured aviation passengers' breach of implied warranties claims were deemed to have arisen before the passengers boarded the ill-fated aircraft.

Constitutional Provision and Statute Involved

(A) Fourteenth Amendment to the United States Constitution, Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of* life, liberty, or *property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws". (Emphasis added).

(B) New York Civil Practice Art, Section 48(1).

"§ 48. Actions to be commenced within six years

"The following actions must be commenced within six years after the cause of action has accrued:

"1. An action upon a contract obligation or liability express or implied, except a judgment and except as provided by section forty-seven and forty-eight-a".

(See also New York's later but nearly identical provision in Section 213(2) of New York's Civil Practice Law and Rules).

Statement of the Case

The litigation arose out of the crash of a passenger transport aircraft near Miami, Florida on March 25, 1958. The crash was caused, petitioners contended at the trial, by the failure of one of the aircraft's engines. Braniff Airways, Inc. owned and operated the DC-7C type aircraft involved and Douglas Aircraft Co. (no longer a party to the litigation) was the manufacturer of the airframe. Douglas had purchased the particular aircraft engine involved on July 17, 1956 from Curtiss-Wright Corporation, the manufacturer. The aircraft, with engines installed, had been sold by Douglas to Braniff on October 23, 1956. Ad-

dabbo and Berg (on whose latter's behalf Morton D. Stein petitions this Court in the capacity of Executor) were passengers severely injured in the crash.

Berg, who had sued in negligence in March of 1960, commenced a separate action on December 23, 1963 asserting breach of implied warranties. (Berg's negligence action has been remanded by the Court of Appeals for a new trial). His actions were to recover for personal injuries and for personal property. Addabbo's action to recover personal injuries was commenced on March 24, 1964 and was premised solely upon a theory of implied warranties.

The only portion of the Court of Appeals' first decision (411 F.2d 451) called into issue by the passengers' petition for rehearing was that dealing with the timeliness of the implied warranty claims. The passengers seek a writ of certiorari with respect to that part of the Court of Appeals' decision (424 F.2d 427) on the petition for rehearing which adhered to its prior determination that the causes of action of Berg and Addabbo based upon implied warranties were barred by the statute of limitations.

REASONS FOR GRANTING WRIT

I

The Federal Court of Appeals has decided an important state question involving the "accrual" of a cause of action in a way in conflict with applicable Florida and New York law.

Berg and Addabbo were both New York residents and the Court of Appeals correctly held (411 F.2d 454) that their implied warranty actions were thus subject to New York's six-year statute of limitation. See also: *Mandel* v. *Pittsburg Plate Glass Co.*, 25 N.Y.2d 340, 253 N. E. 2d 207 (1969). Although petitioners agree that the six-year period is the correct one to be applied, they contend that the Court of Appeals erred in not applying Florida's substantive "accrual" law as it is Florida's substantive law which governs. See: *George* v. *Douglas Aircraft Co.*, 332 F.2d 73, 76 (2nd Cir. 1964), cert. den. 379 U.S. 904 (1964), a related case.

The concept of time of accrual of a cause of action imports " . . . notions of substantive law. . . . " New York Civil Practice (Weinstein-Korn-Miller), Vol. 1 § 203.01, p. 2-39.2. As a general proposition, the period of limitations starts to run when, under the applicable substantive law, the elements of the cause of action are complete. *Merchants Fire Assurance Corporation of N.Y.* v. *Retail Credit Co.*, 23 Cal. Rptr. 544, 547, 206 Cal. App. 2d 55 (Dist. Ct. App. Cal. 1962). See also: *Zuck* v. *Interstate Publishing Corp.*, 317 F.2d 727, 735 (2nd Cir. 1963) (the date of accrual of a cause of action is determined under the law of the state whose substantive law governs the cause of action); *Baron Tube Co.* v. *Transport Insurance Co.*, 365 F.2d 858, 860

(5th Cir. 1966) (Georgia statute of limitations applied but Texas law applied regarding accrual).

The New York "conflict-of-laws" case law, which the Court of Appeals was bound to follow in a "diversity of citizenship" suit, does not appear to be to the contrary. See: *First Nat. Bank of Birmingham* v. *Marcher*, 179 Misc. 258, 38 N. Y. S. 2d 774 (1942) (law of Alabama applied to determine when the cause of action fully matured); *Bicknell* v. *Central Hanover Bank & Trust Co.*, 169 Misc. 7, 6 N. Y. S. 2d 704, aff'd 255 A. D. 956, 8 N. Y. S. 2d 668 (1st Dep't 1938) (Michigan statute and case law applied in determining issue as to when cause of action had matured).

The United States Supreme Court has, in the past, granted certiorari in a "diversity of citizenship" case upon a petition which set up that the United States Court of Appeals for the Sixth Circuit " . . . had erroneously applied the Ohio rule of limitations and of laches, all questions of public importance concerning the interrelation of state and federal courts." *West* v. *American Teleph. & Teleg. Co.*, 311 U. S. 223, 235 (1940). Petitioners respectfully submit that analogous considerations, involving the federal-state relationship, obtain herein.

II

The unreasonableness of the Court of Appeals' interpretation of the New York statute of limitations has resulted in an arbitrary and unconstitutional application of that statute.

Statutes of limitations conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights. *Urie* v. *Thompson*, 337 U. S. 163, 170 (1949). An air-travelling passenger, unlike the usual purchaser of a product, is physically removed from the opportunity for discovery of a defect in the aircraft until, at the earliest, the transit is commenced. "[I]t is all but unthinkable that a person should be time-barred from prosecuting a cause of action before he ever had one", *Mendel* v. *Pittsburg Plate Glass Co.*, 25 N. Y. 2d 310, 346, 253 N. E. 2d 207 (1969) (Judge Breitel dissenting); but this is the possibility created by the holding herein of the United States Court of Appeals for the Second Circuit.

The right to recover damages against another who inflicts injury has always been recognized as a property right. *Sanner* v. *Trustees of Sheppard and Enoch Pratt Hospital*, 278 F. Supp. 138, 142, aff'd 398 F.2d 226 (4th Cir. 1968) (negligence). A right of action which springs from contract (including, petitioners submit, the implied contract of warranty relied upon by passengers Berg and Addabbo) is property within the protection of the Fourteenth Amendment to the National Constitution. *Lamb* v. *Powder River Live-Stock Co.*, 132 Fed. 434, 439 (8th Cir. 1904). See also *Schauble* v. *Schulz*, 137 Fed. 389 (8th Cir. 1905); *Schwartz* v. *Heyden Newport Chemical Corp.*, 12 N. Y. 2d 212, 219, 188 N. E. 2d 142 (1963), mod. 12 N. Y. 2d 1073, 190 N. E. 2d 253 (1963), cert. den. 374. U. S. 808 (1963) (it would be

unreasonable and perhaps unconstitutional to hold that a person's time to sue expired before it was possible for him to learn of the wrong) (Chief Judge Desmond dissenting).

Statutes of limitations are construed, where possible, so as to give the parties their day in court. *Hotaling* v. *General Elec. Co.*, 16 A. D. 2d 339, 342, 228 N. Y. S. 2d 376, (3rd Dep't 1962), aff'd 12 N. Y. 2d 310, 189 N. E. 2d 698 (1963). Petitioners submit that it was a violation of the "due process" clause of the Fourteenth Amendment of the United States Constitution for the Court of Appeals to have held, in effect, that the passengers' causes of action accrued at some time prior to the crash—a time before they were injured and before they learned, or could have learned, of the defects in the aircraft.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILBUR E. DOW, JR.
Counsel for Petitioners

Dated: July 14, 1970

APPENDIX

First Opinion of United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 423-26—September Term, 1968.

(Argued April 8, 1969 Decided May 19, 1969.)

Docket Nos. 32884-87

BRANIFF AIRWAYS, INC., PHILLIP ADDABBO, and MORTON D. STEIN, as Executor of the Estate of Maurice Berg, deceased,

Plaintiffs-Appellants,

—v.—

CURTISS-WRIGHT CORPORATION,

Defendant-Appellee.

Before:

FRIENDLY, KAUFMAN *and* HAYS,

Circuit Judges.

Appeals from a judgment and an order of the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge,* (1) dismissing the com-

plaints of plaintiffs in their actions in negligence, implied warranty and express warranty, arising out of an airplane crash and (2) denying plaintiff Braniff's motion to amend its complaint by adding as plaintiffs the flight crew of the airplane.

Reversed and remanded for trial on the negligence claims of Braniff and Berg's estate, otherwise affirmed.

WILBUR E. DOW, JR., New York, New York (Dow, Stonebridge & Wallace, New York, New York), *for Appellants Braniff and Addabbo.*

W. SHELBY COATES, JR., New York, New York, *for Appellant Stein.*

JAMES F. COUGHLIN, New York, New York (Mendes and Mount, New York, New York, Ernest D. Kennedy, of counsel, *for Appellee.*

HAYS, *Circuit Judge:*

Braniff Airways, Inc., Phillip Addabbo, and Morton D. Stein, as executor of the estate of Maurice Berg, appeal from a judgment of the United States District Court for the Southern District of New York dismissing their complaints in actions against Curtiss-Wright Corporation arising out of an airplane crash that occurred near Miami, Florida on March 25, 1958. Braniff also appeals from an order denying its motion to amend its complaint by adding as plaintiffs the flight crew of the airplane.

Braniff was the airline operating the plane which crashed. Addabbo and Berg[1] were passengers on the plane.

The gravamen of the complaints is that the crash was caused by the failure of an engine manufactured by defendant. Defendant sold the engine to Douglas Aircraft Co. about July 17, 1956; Douglas installed it in a Douglas DC-7C aircraft which it sold to Braniff and delivered on October 23, 1956. Sometime later Braniff removed the engine from this aircraft and installed it in the right inboard position of the Douglas DC-7C which crashed.

Braniff's action is based upon negligence and also breach of both express and implied warranty. Berg sued originally only on the ground of negligence. Later he commenced a separate action in implied warranty, his motion for leave to amend his complaint to assert that claim in the negligence action having been denied. *Berg* v. *Curtiss-Wright*, 224 F.Supp. 236 (S.D.N.Y. 1963). Addabbo also sues on implied warranty. The cases were consolidated for trial together with certain related actions.[2] A jury trial was had, limited by agreement to the issue of liability.

At the end of the plaintiff's case, Curtiss-Wright made several motions which the court collectively treated as a motion pursuant to Rule 50(a) of the Federal Rules of Civil Procedure for a directed verdict. Curtiss-Wright also sought dismissal of the implied warranty claims on the ground that they were barred by the statute of limitations. The court directed a verdict for Curtiss-Wright on the issues of negligence and breach of warranty. It held that the

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[1] Berg died in the course of the litigation and Stein, executor of his estate, was substituted.

[2] One of the related actions was a suit by Braniff against Douglas; it was discontinued during the trial.

claims of Berg and Addabbo based on implied warranty were barred by the statute of limitations.

We reverse the determination of the district court as to the claims sounding in negligence, holding that there was sufficient evidence of defendant's negligence to require submission of that issue to the jury. In all other respects we affirm.

I.

We are persuaded that there was sufficient evidence of Curtiss-Wright's negligence to take the case to the jury.

Examination of the engine in question after the crash revealed that the number eleven cylinder had failed, that it had separated from the engine, and that its wall was scuffed. A Curtiss-Wright employee testified that the cylinder wall showed evidence of "ladder cracking." There was testimony that overheating of a cylinder can cause scuffing and that scuffing can lead to ladder cracking and eventually to cracking of the cylinder barrel and its separation from the engine. A letter that Curtiss-Wright wrote to Braniff after the crash stated that the "cylinder barrel failures" occurring in the Curtiss-Wright engines were "apparently the result of high combustion chamber temperatures."

The evidence of Curtiss-Wright's negligence included the following:

(1) Curtiss-Wright increased the rating of the engines of this so-called E A series (the type of engine involved here) from the 3250 horsepower of the predecessor D A series to 3400 horsepower. Gregory, an independent engineering consultant, testified that the increase in horsepower raised the temperature in the cylinders, aggravating

the scuffing problem and greatly affecting the reliability of the engine. He stated that a reasonable horsepower to take from the engine would have been 3250 rather than 3400.

(2) Curtiss-Wright admitted that the fuel injection pump timing used in the type of engine involved in the crash had caused cylinder temperatures higher than those occurring in a similar Curtiss-Wright engine that used a different timing.

(3) Gregory testified that the use of flexible fuel lines of different lengths to take fuel to the various cylinders caused the cylinders to receive unequal amounts of fuel, resulting in a "large variation" in the temperatures of the cylinders which produced scuffing in the high temperature cylinders.

(4) Gregory testified that the high temperatures in the cylinder caused its separation and Ahlers, another expert witness, testified that the failure of the cylinder caused the crash.

There was evidence that Curtiss-Wright was aware of the scuffing difficulty and knew of instances of cylinder barrel separation by July 26, 1957, nearly eight months before the crash, but took no effective action to remedy the problem.

In reaching our conclusion that there was sufficient evidence of Curtiss-Wright's negligence to require submission of the case to the jury, we do not find it necessary to adopt the rule of *Noel* v. *United Aircraft Corp.*, 342 F. 2d 232 (3d Cir. 1964), that a manufacturer is under a continuing duty to improve its product where "human safety" is involved. It is clear that after such a product has been sold and dangerous defects in design have come

to the manufacturer's attention, the manufacturer has a duty either to remedy these or, if complete remedy is not feasible, at least to give users adequate warnings and instructions concerning methods for minimizing the danger.

II.

Curtiss-Wright contends that Braniff was contributorily negligent as a matter of law.

The principal basis for Curtiss-Wright's position is Braniff's admission that "on or about July 8, 1959, [Braniff] made a determination upon information then available that Captain Thomas Donald George [the pilot] was responsible for the accident . . ." and that it discharged him on this ground. There is no reason to believe that in holding the pilot "responsible" Braniff was applying the standard of care imposed by law. The admission states that the determination of responsibility was based on information available to Braniff by July 8, 1959. That date was more than eight months before the commencement of this action. Braniff may well have acquired further information during that period. The admission was merely evidence of contributory negligence which Braniff could seek to rebut at trial.

It is not necessary to record in detail certain other evidence of contributory negligence. We are convinced that all of this evidence presented an issue for the jury.

III.

We hold that the causes of action of Braniff, Addabbo and Berg based upon implied warranty are all barred by the statute of limitations. This makes it unnecessary for us

to discuss the district court's decision to direct a verdict against Braniff on that cause of action.

Under the New York law, the action by Braniff, an Oklahoma corporation, was untimely if it was barred by either the laws of New York or the laws of Florida. New York Civil Practice Law and Rules §202 (McKinney 1963).[3]

The action was not timely under the Florida statute of limitation, Fla. Stat. §95.11(4)(e)(1967), as construed in *Creviston* v. *General Motors Corp.*, 210 S. 2d 755 (Fla. Dist. Ct. App. 1968)—a case of which the district court was apparently unaware when it ruled that the action was timely. *Creviston* holds that the period of limitation in an implied warranty action is three years and that the action accrues at the time of sale. We believe that New York would accept the holding of the Florida appellate court in *Creviston* as representing the law of Florida, particularly since it is in accord with New York law as to accrual of the cause of action. (See *infra.*) The engine was sold in 1956; therefore commencement of the suit in 1960 was not timely.

Berg and Addabbo were both New York residents; their implied warranty actions were thus subject to New York's six year statute of limitation. New York Civil Practice Law and Rules §§213(2), 202 (McKinney 1963). Under New York law, these actions accrued at the time of the sale in 1956. See *Schwartz* v. *Heyden Newport Chemical Corp.*, 12 N.Y. 2d 212, 215, 237 N.Y.S. 2d 714, 716, modified, 12 N.Y. 2d 1073, 239 N.Y.S. 2d 896, cert. denied, 374

[3] That Florida is the state where the cause of action accrued for purposes of N.Y. C.P.L.R. §202 (McKinney 1963) is not contested.

U.S. 808 (1963).[4] Since Berg commenced his action in 1963 and Addabbo commenced his in 1964, both actions were untimely. Nor would they be timely even if we were to accept the contention that the date of accrual is governed by Florida law; *Creviston* makes clear that Florida follows the New York rule.

IV.

Braniff claims that Curtiss-Wright made express warranties concerning the engine in two pamphlets: "Facts about the Wright Turbo Compound" and an engineering report on the "TC18 Engine Operating Margin." The foreword to the former publication states that its purpose is to "explain the principles of the turbine system." On the cover of the engineering report is the statement: "This report is for information only and does not supersede, cancel, or change applicable engine specification or operating instructions." The statements in these two informational pamphlets are not warranties.

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[4] *Schwartz*, a case involving the sale and use of injurious medication, concerned the date of accrual of a negligence cause of action and an implied warranty cause of action; it held that the implied warranty action accrued at the time of sale and that the negligence action accrued when the medication was administered.

The *Schwartz* holding on implied warranty actions is not affected by the recent New York Court of Appeals 4-3 decision in *Flanagan* v. *Mount Eden General Hospital* (April 17, 1969) (not yet reported). *Flanagan* holds that in medical malpractice actions for negligence, involving the insertion of a foreign object into a patient's body, the cause of action does not accrue until the object is discovered. The court discussed *Schwartz* but was concerned only with its holding regarding the accrual of the negligence action. The court in *Flanagan* distinguished *Schwartz* and clearly limited *Flanagan's* application to foreign object malpractice cases.

V.

The district court denied Braniff's motion to amend its complaint by adding the members of the flight crew as plaintiffs. It appears that even if the requested amendment were made, the complaint would not state a cause of action on behalf of the crew. If that is the case, the denial was irrelevant. In any event, the motion in substance is one to permit the crew to intervene. Braniff could not properly make this motion; it must be made by the parties seeking to intervene. Rule 24(c), Federal Rules of Civil Procedure.

VI.

We wish to record our disapproval of the parties' disregard of the provisions of the Federal Rules of Appellate Procedure. Although Rule 30 does not require that the parties agree on the contents of an appendix, it explicitly requires the filing of a single appendix. The parties chose instead to file an appellants' appendix and an appellee's appendix. Thus, in order to consider a given witness' testimony in this highly technical case, it was necessary for us to jump from one appendix to the other. The rule requiring a single appendix was adopted to facilitate our task of judicial review.

Appellants also failed to reproduce in their Appendix the two pamphlets, Exhibits 5 and 15A, on which they rely to establish a cause of action for breach of express warranty.

Litigants are advised to consider these remarks as a warning of the possibility of more drastic action by the court in the future.

Affirmed as to all issues except the causes of action for negligence; as to these reversed and remanded for a new trial.

Order Following Petition for Rehearing *In Banc*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

32884-87

BRANIFF AIRWAYS, INC., PHILLIP ADDABBO, and MORTON D. STEIN, as Executor of the Estate of Maurice Berg, deceased,

Plaintiffs-Appellants,

—v.—

CURTISS-WRIGHT CORPORATION,

Defendant-Appellee,

(and 3 other cases).

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

June 13 1969

Order Following Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

32884-87

BRANIFF AIRWAYS, INC., PHILLIP ADDABBO, and MORTON D. STEIN, as Executor of the Estate of Maurice Berg, deceased,

Plaintiffs-Appellants,

—v.—

CURTISS-WRIGHT CORPORATION,

Defendant-Appellee,

(and 3 other cases).

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

June 13 1969

Second Opinion of United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 423-26—September Term, 1968.

(Decided April 16, 1970.)

Docket Nos. 32884-32887

BRANIFF AIRWAYS, INC., PHILLIP ADDABBO, and MORTON D. STEIN, as Executor of the Estate of Maurice Berg, deceased,

Appellants,

—v.—

CURTISS-WRIGHT CORPORATION,

Appellee.

Before:

FRIENDLY, KAUFMAN and HAYS,

Circuit Judges.

On petition for Rehearing

WILBUR E. DOW, JR., New York, N. Y., *for appellants Braniff Airways, Inc., and Phillip Addabbo.*

Second Opinion of United States Court of Appeals For the Second Circuit

W. SHELBY COATES, JR., New York, N. Y., *for appellant Morton D. Stein as executor of the estate of Maurice Berg, deceased.*

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KAUFMAN, *Circuit Judge*:

Appellants petition for rehearing of our decision in *Braniff Airways, Inc., et al.* v. *Curtiss-Wright Corporation*, 411 F.2d 451 (2d Cir. 1969), claiming that a state court decision filed subsequent to ours requires us to change our interpretation of the pertinent state statute of limitations.

The facts are fully set forth in our main opinion and so we shall be content with a brief summary here. Curtiss Wright sold airplane engines on July 17, 1956 to Douglas Aircraft Corporation, who in turn sold them (installed in a DC-7C) to Braniff, on October 23, 1956. Two years later, on March 25, 1958, the plane crashed near Miami, Florida. Braniff instituted suit against Curtiss-Wright in the United States District Court for the Southern District of New York on March 21, 1960; Maurice Berg[1] and Phillip Addabbo, passengers on the plane, waited until December 23, 1963, and March 24, 1964, respectively, to file their suits. All three were consolidated for trial.

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[1] Berg died in the course of the litigation; his executor, Morton D. Stein, was substituted for him.

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The only portion of our prior opinion called into issue on this petition for rehearing is that dealing with the timeliness of claims of implied warranty, which all three plaintiffs raise. Sitting in a diversity action, we must apply the law of the forum state in matters of substantive law, including the state's conflict of laws doctrines. See *Klaxon* v. *Stentor Mfg. Co., Inc.*, 313 U.S. 487 (1941); *Sampson* v. *Channel*, 110 F.2d 754 (1st Cir.), cert. denied, 310 U.S. 650 (1940). New York, by statute, New York Civil Practice Law and Rules §202 (McKinney 1963),[2] provides that for causes accruing in another state, non-resident plaintiffs will be barred from instituting suit if they are barred by the statute of limitations of either jurisdiction; New York residents, however, will be affected only by the New York limitations period. Berg and Addabbo are New York residents; Braniff is considered a resident of its state of incorporation, Oklahoma. New York's six year limitation period runs from the date of sale. See CPLR §213(2) (McKinney 1963). Compare *Schwartz* v. *Heyden Newport Chemical Corp.*, 12 N.Y.2d 212, 215, 237 N.Y.S.2d 714, 716, 188 N.E.2d 142, 143, modified, 12 N.Y.2d 1073, 39 N.Y.S.2d 896, 190 N.E.2d 253, cert. denied, 374 U.S. 808 (1963) with *Flanagan* v. *Mount Eden General Hospital*, 24 N.Y.2d 427, 301 N.Y.S.2d 23, 248 N.E.2d 871 (1969). At the time of our decision on this appeal, relying on *Creviston* v. *General Motors Corp.*, 210 So.2d 755 (Fla. Dist. Ct. App. 1968),

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[2] §202. Cause of action accruing without the state
An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

we were of the view that Florida, like New York, applied its statute of limitations, which is three years, from the date of sale. Thus we held Braniff was barred by the Florida statute applicable by virtue of CPLR §202, and found Berg's and Addabbo's implied warranty claims untimely under the New York statute.

Our decision was filed on May 19, 1969, and a requested rehearing *en banc* was denied June 13, 1969. But in *Creviston* v. *General Motors Corp.*, 225 So. 2d 331, the Florida Supreme Court on July 2, 1969 reversed the intermediate appellate court decision on which we had relied, and held that the conflict in Florida lower court opinions over the accrual date in implied warranty cases should be resolved by computing the period from the time that the defect was, or should have been, discovered instead of the date of sale. Before considering the effect of the Florida Supreme Court's decision on our prior holding, we must first determine whether reconsideration of our original decision at this time is proper.

We note that the [defendant] filed a petition for certiorari on September 11, 1969 which was denied on December 8, 1969. 32 U.S.L.W. 3210. After certiorari was filed, but before it was denied, plaintiffs learned of the reversal in *Creviston* and filed a motion in this court styled a request for "modification of decision of the court or for enlargement of the time to petition for rehearing."

It seems clear to us that we have the power to enlarge the time to petition for rehearing, F.R.A.P. 26(b), 40, and to modify an erroneous decision although the time for rehearing may have expired. See *United States* v. *Certain Land*, Docket Nos. 31181, 31182 (slip op. 3921) (2d Cir. Sept. 4, 1969) (deleting award of interest three months

after original decision). See also *National Comics Publishers* v. *Fawcett*, 198 F.2d 927 (2d Cir. 1952) (court of appeals may change and modify mandate of prior term). Accord, *United States* v. *63.04 Acres of Land*, 257 F.2d 68, 69 (2d Cir. 1958).

This Circuit has long shown considerable willingness to correct what it believed an erroneous interpretation of the law when an intervening state decision seemed to indicate a better view. See *Johnson* v. *Cadillac*, 261 F. 878 (2d Cir. 1919), following *McPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); (Cardozo, *J.*). In *Johnson* we modified, on appeal from a remand of the same case, a rule we had previously declared in remanding it, viewing the proper resolution of the controversy more important than rigid adherence to the law of the case. And in *Vanderbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941) the Court directed courts of appeals sitting in diversity cases to follow new state court decisions occurring subsequent to the date of the district court judgment, but before the court of appeals decision.

Even more telling was the Court's action in *Huddleston* v. *Dwyer*, 322 U.S. 232 (1944), where it vacated a Court of Appeals decision for failing to consider a new state court opinion that (like *Creviston*) was handed down after the time for rehearing had expired. In *Huddleston*, the petitioners had sought a second rehearing some six months after entry of judgment, a period considerably longer than that before us. The Supreme Court indicated that so long as the case was *"sub judice"* the court of appeals should have entertained the petition for rehearing based on a change in state law; it did not indicate, however, precisely what the bounds of the term *"sub judice"* might be. Under

circumstances similar to *Huddleston*, we may consider petitions filed after rehearing has been denied, and even after the time to petition for rehearing has passed, see F.R.A.P. 40. The question we must determine is whether we should also entertain rehearings when a petition for certiorari already has been filed. *Huddleston* seems to indicate that we should. Instead of reversing the court of appeals, and deciding the state law issues itself, the Supreme Court there vacated the court of appeals decision, and remanded to that court to permit it to determine the issues of state law in the first instance, on the basis of the new state court decision. For us to refuse to consider petitions for rehearing under the circumstances present here merely because a petition for certiorari has been filed would be, it seems to us, wasteful, for under the *Huddleston* procedure the Supreme Court would not reach the merits of the controversy, but would vacate our decision and order us to reconsider on the basis of the recent state opinion. Hence we conclude that in the interests of justice we should consider what effect the Florida Supreme Court's decision in *Creviston* will have on our prior judgment in this case.[3]

First, Braniff's claim based on implied warranty is not barred as a matter of law in either Florida or New York, and so we reinstate that claim. See CPLR §202. The sales took place in 1956; suit was filed in 1960, making the action timely in New York. Assuming that the time of the crash (1958) was the first time that Braniff had notice of the

[3] *Lennig* v. *New York Life Ins. Co.*, 130 F.2d 580, 581 (3d Cir. 1942) suggests that a lower court on retrial may follow a state law rule different from the one relied upon in the federal court of appeals if there is an interim state court decision squarely in point. This would provide additional support for our decision to reconsider application of the *Creviston* rule, before remanding.

defect in the engines,[4] it also satisfied the Florida statute, since the Florida Supreme Court in *Creviston* indicated that its limitation period ran from the time when the party "discovered or should have discovered" the defect. 225 So.2d at 332.[5]

Berg's and Addabbo's claims are governed by the New York period of limitations, CPLR §202, and since both filed suit more than six years after the sale, they would ordinarily be barred by the New York period of limitations. See CPLR §213(2); *Schwartz* v. *Heyden Newport Chemical Corp.*, 12 N.Y.2d 212, 215, 237 N.Y.S.2d 714, 716, 188 N.E.2d 142, 143, modified, 12 N.Y.2d 1073, 239 N.Y.S.2d 896, 190 N.E.2d 253, cert. denied, 374 U.S. 808 (1963). Plaintiff's urge, however, that we should apply the Florida time of accrual to the New York period of limitations, and thus find both Berg's and Addabbo's suits timely. Their argument, in effect, is that accrual should be governed by the law governing the substantive cause of action, here Florida. This "jurisdiction-selecting" approach and its mirror image, which demands that the period of limitations and its accompanying accrual date must be chosen from the same state, have been rejected by the New York Court of Appeals in favor of an approach that examines each issue, and evaluates and weighs the competing policies expressed in

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[4] Curtiss-Wright argues that Braniff had earlier notice of the defect in the engines, and that thus the statute of limitations has run even if measured from the time of discovery. That contention should be left for resolution at trial.

[5] The district court also appears, in the alternative, to have directed a verdict on the merits of Braniff's implied warranty claim. See 411 F.2d at 454. For the same reasons governing our reversal of a directed verdict on Braniff's negligence cause, 411 F.2d at 453, we believe that there was sufficient evidence to take the implied warranty claim to the jury.

each state's rule. See, e.g., *Long* v. *Pan American World Airways*, 16 N.Y.2d 337, 266 N.Y.S.2d 513 (1965).

There appear to be no New York decisions precisely in point on the limitations issue, at least since the conflicts-of-law trail blazers, *Kilberg* v. *Northeast Airlines*, 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961) and *Babcock* v. *Jackson*, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963). Thus we must give flesh to the policy considerations that underlie each state's rule. The general aim of statutes of limitation is to cut short pursuit of stale claims; in New York a relaively long period of limitations is sharply cut back by the rule that the cause for implied warranty accrues at sale, and not at discovery of breach. The New York policy, we may reasonably infer, is to afford a litigant no more time to sue than that contemplated by the interplay of the two rules. The same may be said of Florida's shorter time limit, which is in effect extended by beginning computation at discovery rather than sale.

The effect of permitting Berg and Addabbo to apply the Florida accrual date to the New York period of limitations would be to create a hybrid period of limitations, longer than that available in either state. Given a strong policy in the forum state looking towards an extension of available remedies, cf. *Kilberg* v. *Northeast Airlines*, 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961), such a result might be permissible.[6] In the instant case, however, there is no such showing. Indeed, as suggested, we have no rea-

[6] In *Kilberg* the New York Court of Appeals did apply the New York rule on damages to the Massachusetts wrongful death statute, but Kilberg is clearly distinguishable. There the New York rule against limiting damages was an affirmative state policy; here there is no demonstrable or even speculative interest in extending the time to sue for accidents occurring outside the state, but not for those occurring within it.

son to believe that New York would choose to extend its already long period of limitations by permitting the Florida accrual at discovery rule to govern. Additional support for this conclusion may be derived from New York's own treatment of statutes of limitation that run from the time the facts could reasonably have been discovered rather than the date of the injury or agreement. Though called a "tolling" rather than an "accrual" provision, CPLR §203(f) limits the time within which suit may be brought to the longer of the usual period of limitations or two years from the actual or imputed discovery date, thus indicating a New York policy against adding a long statute of limitations (such as six years) to a cause that accrues at, or is tolled until, discovery.[7] Even if CPLR §203(f) were not thought

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[7] CPLR §203, Method of computing periods of limitation generally

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(f) Time computed from actual or imputed discovery of facts. Except as provided in Article 2 of the uniform commercial code, where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer.

As the New York statute indicates, provisions stating that the cause "accrues" at discovery (Florida), or that the statute of limitations is "tolled" until discovery (New York), are simply different verbal formulations intended to reach the same result. Hence it is instructive that the New York courts, when applying foreign statutes of limitation, also accept their tolling provisions *in toto*. See *Cellura* v. *Cellura*, 24 A.D.2d 59, 263 N.Y.S.2d 843 (1965). This suggests that New York would consider the Florida accrual at discovery rule (which is functionally identical to the New York tolling provision) intimately tied to its period of limitation, and would apply both to decide when the cause was extinguished.

by its terms to govern a foreign accrual date, its policy—cutting back the time limit when the statute is extended through nondiscovery—should show a legislative reluctance to permit the extension of the time to sue urged by plaintiffs here.

The petition to enlarge the time for filing a petition for rehearing, and for rehearing, is granted. Upon rehearing we adhere to our prior decision except that we reinstate Braniff's claim for implied warranty.

HAYS, Circuit Judge (concurring and dissenting):

I agree with the majority's determination that reconsideration of our original decision at this time is required by the authorities and that Braniff's claim for implied warranty should be reinstated. However, I would also reinstate Berg's and Addabbo's claims for implied warranty.

The majority finds it "highly doubtful" that the New York courts would permit the Florida accrual at discovery rule to govern. I do not agree. The New York courts have rejected a mechanical jurisdiction selecting rule.

> "Justice, fairness, and 'the best practical result' . . . may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation." *Babcock* v. *Jackson*, 12 N.Y.2d 473, 481, 240 N.Y.S.2d 743, 749 (1963) [citation omitted].

Florida has adopted its accrual rule to encourage the prevention of injury in that state caused by "the latently

defective condition of . . . product[s]," *Creviston* v. *General Motors Corp., Fla.* 225 So.2d 331, 333 (1969), and to deal with a well-founded sense of outrage that because of "blameless ignorance" (*id.* at 334) plaintiffs should go uncompensated for invasions of their legal rights.

Thus Florida, by its accrual at discovery rule, has placed a greater burden than has New York[1] on manufacturers who may cause injury within that state. The additional standard of care imposed by Florida is not unlike a "rule of the road" about which the court in *Babcock* said:

> "In such a case, it is appropriate to look to the law of the place of the . . . [injury] so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place." 12 N.Y.2d at 483, 240 N.Y.S.2d at 750-51.

The time of sale rule is applied grudgingly by the New York courts. See *Schwartz* v. *Heyden Newport Chemical Corp.*, 12 N.Y.2d 212, 217-19, 237 N.Y.S.2d 714, 717-19 (dicta) (and dissenting opinion of Chief Judge Desmond, 12 N.Y.2d at 219, 237 N.Y.S.2d at 719), modified, 12 N.Y.2d 1073, 239 N.Y.S.2d 896, cert. denied, 374 U.S. 808 (1963). An exception has recently been fashioned by the Court of Appeals. *Flanagan* v. *Mount Eden General Hospital*, 24 N.Y.2d 427, 301 N.Y.S.2d 23 (1969). In the light of their dissatisfaction with the time of sale rule, the New York courts would be likely to welcome an opportunity to avoid

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[1] The longer period of limitations in New York only partly compensates for its rule of accrual at the time of sale. In many instances a latent defect may not be discovered until more than six years after the product has been sold.

extending that rule, while at the same time taking proper account of Florida's legitimate interests.

The cases cited by the majority to show that, when the New York courts apply a foreign statute of limitations, they also apply the pertinent foreign tolling provision are not relevant to the present problem. A tolling provision is closely akin to a statute of limitations—indeed an integral part of such a statute. The time an action accrues imports "notions of substantive law," 1 Weinstein-Korn-Miller, New York Civil Practice §203.01, at 2-39.2 (1969). See *First Nat'l Bank* v. *Marcher*, 179 Misc. 258, 38 N.Y.S.2d 774 (Sup. Ct. 1942); *Bicknell* v. *Central Hanover Bank & Trust Co.*, 169 Misc. 7, 6 N.Y.S.2d 704 (Sup. Ct.), aff'd 255 App. Div. 956, 8 N.Y.S.2d 668 (1st Dep't 1938); *Zuck* v. *Interstate Publishing Corp.*, 317 F.2d 727, 735 (2d Cir. 1963); *Baron Tube Co.* v. *Transport Ins. Co.*, 365 F.2d 858, 860 (5th Cir. 1966).[2]

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[2] Section 203(f) of the New York Civil Practice Act and Rules would be irrelevant even if the New York rule as to accrual date were to be applied.

Note Regarding Missing Documents

Petitioners' counsel have been unable to locate the originals or copies of the judgment entered on May 19, 1969 by the Court of Appeals and the order entered on April 16, 1970 by the Court of Appeals. The missing judgment may be part of the record certified to the Supreme Court of the United States on July 28, 1969 in connection with respondent's Petition for a Writ of Certiorari filed on September 11, 1969. The office of the Clerk of the Court of Appeals for the Second Circuit has advised petitioners' counsel that the missing order may have been misfiled. Petitioners' counsel will continue to try to trace the missing documents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 398

PHILLIP ADDABBO and MORTON D. STEIN,
as Executor of MAURICE BERG, Deceased,

Petitioner,

—against—

CURTISS-WRIGHT CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Respondent's Submissions	2
Constitutional Provision and Statute Involved	2
Rule 40. Petition for Rehearing	3
Rule 24. Brief in Opposition—Reply—Supplemental Briefs	3
Statement of the Case	4
Reasons for Denying the Petition	6

Cases Cited

Alexander v. Philips Petroleum, 130 F. 2d 593	7
Creviston v. General Motors, 210 S. 2d 755	5
O'Brien v. Wheelock, 184 U. S. 450, 22 S. Ct. 354; 46 L. Ed. 636	7

United States Constitution Cited

Fourteenth Amendment	2

Other Authorities Cited

F.R.A.P. 40	6
Rule 24(5)	2

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Opinions Below

The decision of the District Court for the Southern District of New York was delivered on June 20, 1968 and not reported.

The subsequent opinions of the Court of Appeals for the Second Circuit are reproduced in the Appendix of the Petition for Certiorari.

Respondent's Submissions

1. The Court of Appeals does not have the power to entertain and grant a petition for rehearing submitted on November 6, 1969 approximately seven months after the determination of an appeal to said Court of Appeals from the decision of the District Court.

2. The Court of Appeals may not on April 16, 1970 on an untimely petition for rehearing of its order of May 19, 1969 modify a decision of the District Court dated June 20, 1968 after a prior determination by said Court of Appeals on May 19, 1969 of an appeal from the District Court decision, said petition for rehearing being based on a change in state law on July 2, 1969.

3. The Court of Appeals may not entertain and consider an untimely motion for rehearing filed November 6, 1969 in violation of Rule 24(5) of the Rules of the Supreme Court during the pendency of a Petition for Certiorari filed by the instant respondent to the Supreme Court on September 11, 1969.

4. The Court of Appeals may not nullify a Petition for Certiorari filed at a prior date and still undetermined by a subsequent modification of the decision to which the Petion for Certiorari was addressed?

5. The Court of Appeals may not modify a prior decision at any time upon a change in State law affecting such litigation.

6. The Court of Appeals may not deprive the respondent of due process of law because of the modification of the order upon which the Petition for Certiorari was based.

Constitutional Provision and Statute Involved

"(A) Fourteenth Amendment to the United States Constitution, Section I:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"Rule 40. Petition for Rehearing

Time for Filing; Content; Answer; Action by Court if Granted. A Petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or make such other orders as are deemed appropriate under the circumstances of the particular case. * * *"

"Rule 24. Brief in Opposition—Reply—Supplemental Briefs.

5. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending call-

ing attention to new cases or legislation or other intervening matter not available at the time of his last filing."

Statement of the Case

The litigation arose out of the crash of a passenger transport aircraft near Miami, Florida, on March 25, 1958. The complaint alleged that the crash was caused by the failure of one of the aircraft engines. Braniff Airways owned and operated the DC-7C type aircraft involved and Douglas Aircraft Co. (no longer a party to the litigation) was the manufacturer of the airframe. Curtiss-Wright was the manufacturer of the engine.

The trial was had of the within action before Honorable Irving Ben Cooper, U. S. District Court Judge. Trial was limited to the issue of liability and took place before a jury from June 4th to June 20th, 1968. At the close of the plaintiff's evidence the respondent herein moved for a direction of a verdict in its favor on the Braniff and Berg causes of action of negligence and warranty. This motion was also accompanied by motions by respondent to dismiss the complaints of the petitioner, Addabbo, in breach of implied warranty on the grounds that such causes of action were barred by all applicable statutes of limitations and for failure of proof. The Court granted the motions addressed to dismissals of the causes of action asserted by Addabbo on the basis of implied warranties. The Court also granted the motion for a directed verdict on the Braniff and Berg claims and directed that judgment be entered for Curtiss-Wright. Judgment was accordingly entered on June 26, 1968. Notices of appeal were timely filed by the petitioners herein.

An appeal was taken by the petitioners herein to the Court of Appeals, Second Circuit, which Court on May 19, 1969 entered its opinion and order affirming the dis-

missals of the causes of action in implied warranty of Braniff, Berg, (Stein) and Addabbo but reversing the District Court as to the negligence causes of the actions brought by Braniff and Berg.

On September 11, 1969, a Petition for Certiorari was filed in the United States Supreme Court on behalf of respondent herein seeking review of this determination of the Court of Appeals.

On July 2, 1969, the highest court in the State of Florida reversed the case upon which the Court of Appeals had relied in its affirmance of the dismissal of Braniff's breach of warranty claim. The lower court in Florida had decided the case of *Creviston* v. *General Motors*, 210 S. 2d 755; in which case the Court held that the period of limitation in an implied warranty action is three years and that the action accrues at the time of sale. In its decision of July 2, 1969, the Supreme Court of Florida held that the time of accrual of the cause of action in implied warranty runs from the date of the injury.

On November 6, 1969 the petitioner herein moved before the Court of Appeals to modify its opinion which had been rendered on May 19, 1969.

On November 25, 1969 the Court of Appeals directed both parties to submit briefs as to the motion for modification.

On December 8, 1969 the Petition for Certiorari was denied.

On April 16, 1970 the Court of Appeals modified its first decision and reinstated the cause of action in implied warranty on behalf of Braniff.

The decision of the Court of Appeals on April 16, 1970 stated that it seemed clear that such Court had the power

to enlarge the time to petition for re-hearing citing F.R.A.P. 40.

Reasons for Denying the Petition

The decision of the Court of Appeals for the Second Circuit stated that it seemed clear that they have the power to enlarge the time to petition for re-hearing (citing F.R.A.P. 40) but no citation was given in such opinion as to the source of their power to grant a petition for re-hearing approximately two years after the trial decision and six months after its determination of an appeal and after a Petition for Certiorari had been filed by respondent herein.

The facts and dates as presented heretofore are as follows:

Date of District Court Decision	June 20, 1968
Date of Decision of Court of Appeals	May 19, 1969
Petition for Certiorari filed by respondent	September 11, 1969
Motion to modify decision	November 6, 1969
Request by Court of Appeals for briefs.	November 25, 1969
Petition for Certiorari denied	December 8, 1969
Motion to modify prior determination granted	April 16, 1970

At the time of the sale of the engine in 1956; at the time of the trial and at the time of the first decision of the Court of Appeals, the law of Florida was as expressed in the first decision of the Court of Appeals.

It was not until July 2, 1969 that the law of Florida was changed and it was not until November, 1969 that an untimely petition for re-hearing was submitted to the Court of Appeals.

It is respectfully submitted that such action makes futile any repose of litigation and is an abuse of discretion because of the unreasonable time after its decision that the petition for re-hearing was allowed and modification granted.

In addition thereto it is submitted that petitioners were guilty of laches in that the decision of the Florida Court was in July, 1969; the petition for certiorari filed September, 1969 and the motion to modify the Court of Appeals decision, November, 1969.

Despite the fact that the petitioners herein state in their motion before the Court of Appeals that certiorari was then pending, the motion was granted and modification made.

As stated in *Alexander* v. *Philips Petroleum*, 130 F. 2d 593, the Court stated:

> "Laches consists of two elements, inexcusable delay in instituting suit and prejudice resulting to the defendant from such delay. Its existence depends upon the equities of the case, and not merely, upon the lapse of time."

Further in *O'Brien* v. *Wheelock*, 184 U. S. 450, 22 S. Ct. 354, 46 L. Ed. 636, the Court said as follows:

> "The statute of limitations of Illinois provided that actions on unwritten contracts, express or implied, and all civil actions not otherwise provided for, should be commenced within five years next after the cause of action accrued. Courts of equity

usually consider themselves bound by the statutes of limitation which govern courts of law in like cases. * * *

"The doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time is thoroughly settled. Its application depends on the circumstances of the particular case. It is not a mere matter of lapse of time, but of change of situation during neglectful repose, rendering it inequitable to afford relief.

"And if in this case any ground of relief on the theory of implied contract ever existed, the want of diligence presented an insuperable bar to its assertion."

Nowhere in the motion to modify the first opinion of the Court of Appeals is there any reason presented for the delay from July, the date of the Florida decision, until November, the date of petitioner's motion.

The action of the Court of Appeals, it is submitted, deprived respondent of due process of law in violation of its constitutional rights.

Since the application for modification invoked the equitable powers of the Courts of Appeals, laches was clearly present in the instant litigation.

Respectfully submitted,

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